

FILED

MAY - 8 2013

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

UNITED STATES DISTRICT COURT

Northern District of California

Oakland Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN OCTAVIANO LOPEZ,

Defendant.

No. CR 09-775 SBA (DMR)

AMENDED REPORT AND
RECOMMENDATION
REGARDING GUILTY PLEA

The Report and Recommendation Regarding Guilty Plea filed on February 19, 2013 is hereby amended through addition of the **bolded** text noted below.

The magistrate judge recommends to the district judge that it accept defendant Juan Octaviano Lopez's guilty plea entered in open court on February 19, 2013. Specifically, the defendant pleaded guilty pursuant to a written plea agreement to count 2 of the first superceding indictment charging a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(viii) (**possession with intent to distribute and** distribution of at least five grams of methamphetamine). The magistrate judge makes the following findings:

1. On the hearing date set forth above, with the assistance of counsel, the defendant waived his right to enter his guilty plea before a district judge and instead consented to enter his plea in a hearing in magistrate court. Specifically, the magistrate judge advised him that he had a right to plead guilty in district court and that under 28 U.S.C. § 636(b) and Federal Rule of Criminal

AMENDED REPORT AND RECOMMENDATION
CR 09-775 SBA (DMR)

cc: Copy to parties via ECF, Lisa Clark, Probation

UNITED STATES DISTRICT COURT
For the Northern District of California

1 Procedure 59, he could waive that right and consent to enter his plea in a plea hearing in magistrate
 2 court. The magistrate judge also advised him that it would issue a written report recommending that
 3 the district judge accept the guilty plea, that the district judge would review that recommendation
 4 and determine whether to accept the guilty plea, and that the district judge and not the magistrate
 5 judge would sentence him. The magistrate judge also advised him of the procedures (also set forth at
 6 the end of this recommendation) for challenging the magistrate judge's recommendation. The
 7 defendant then waived his right to proceed in district court in open court and in writing and
 8 consented to the magistrate judge's conducting the plea hearing.

9 2. The magistrate judge conducted a full plea hearing in the manner set forth in Federal Rule
 10 of Criminal Procedure 11. In particular, the magistrate judge reviewed, and the defendant
 11 acknowledged that he understood, the following: (a) the nature of each charge and the maximum
 12 penalties, as set forth in Fed. R. Crim. P. 11(b)(1) (G)-(L); (b) the effect of the advisory Sentencing
 13 Guidelines and 18 U.S.C. § 3553(a), *see* Fed. R. Crim. P. 11(b)(1)(M); and (c) the rights he was
 14 waiving by pleading guilty, *see* Fed. R. Crim. P. 11(b)(1) (A)-(F). The court reviewed the specific
 15 provisions of the plea agreement regarding waiving the right to appeal or collaterally attack the
 16 sentence. *See* Fed. R. Crim. P. 11(b)(1)(N). The magistrate judge also determined that there was a
 17 factual basis for the guilty plea. *See* Fed. R. Crim. P. 11(b)(3).

18 3. The plea agreement itself was disclosed in open court, *see* Fed. R. Crim. P. 11(c)(2), and
 19 the magistrate judge advised the defendant as follows:

20 A. To the extent that the plea agreement was an agreement of the type specified in Rule
 21 11(c)(1)(A) or (C), the district judge may accept the agreement, reject the agreement,
 22 or defer a decision until the district judge reviewed the presentence report. Also, to
 23 the extent that the district judge accepts the agreement, the agreed disposition will be
 24 reflected in the judgment. To the extent that the district judge rejects the agreement,
 25 it will inform the parties, advise the defendant that it is not required to follow the plea
 26 agreement, and give the defendant an opportunity to withdraw the plea. If the district
 27 judge rejects the plea agreement and the defendant does not withdraw his plea, then
 28 the court may dispose of the case less favorably toward the defendant than the plea
 agreement contemplated.

B. To the extent that the plea agreement was of the type specified in Rule 11(c)(1)(B),
 the defendant had no right to withdraw his plea if the district judge did not follow the
 parties' recommendation or request.

See Fed. R. Crim. P. 11 (c)(3)-(5).

1 4. The magistrate judge also addressed the defendant personally in open court, and
2 determined that the plea was voluntary and did not result from force, threats, or promises (other than
3 the promises in the plea agreement). *See* Fed. R. Crim. P. 11(b)(2).

4 5. After the advisements set forth in Rule 11, and summarized here, the defendant pleaded
5 guilty as summarized above. The magistrate judge found that he was fully competent and capable of
6 entering an informed plea, that he was aware of the nature of the charges and the consequences of the
7 guilty plea, and that the guilty plea was knowing and voluntary and supported by an independent
8 factual basis. This court thus recommends to the district judge that it accept the defendant's guilty
9 plea.

10 6. Any party may serve and file specific written objections within fourteen days after being
11 served with a copy of this order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59. Failure to file
12 objections within the specified time may waive a party's right to review. *See* Fed. R. Crim. P. 59(b).

13 7. This matter has been set for further proceedings before the district court on **June 11**, 2013
14 at 10:00 a.m.

15 IT IS SO RECOMMENDED.

16 Dated: May 8, 2013



DONNA M. RYU
United States Magistrate Judge